Sii Toh Siong v Hung Ming Chung

HIGH COURT (SIBU) — CIVIL APPEAL NO 11-2 OF 1999
TEE AH SING J
21 JANUARY 2000

Civil Procedure *— Appeal — Record of appeal — Whether mandatory requirement for record of appeal to contain sealed judgment — Subordinate Court Rules 1980 O 29 rr 9, 10 & O 49 r 6(3)(d)*

Civil Procedure *— Preliminary objection — Notice to opponent — No prior notice given — Whether preliminary objection can be raised*

The appellant's application to enter summary judgment against the respondent was dismissed by the learned magistrate and the appellant appealed to the High Court. Before the hearing of the appeal, counsel for the respondent raised a preliminary objection on the record of appeal filed by the appellant pursuant to O 49 r 6(3) of the Subordinate Courts Rules 1980 ('the SCR') as the record of appeal of the appellant contained only a draft copy of the order of the learned magistrate and not the sealed order. Counsel for the appellant contended that: (i) notice of such objection must be served on the other side specifying the grounds of objection and no such notice has ever been given; and (ii) the requirement under O 49 is purely directory and although the proceeding is called an appeal, as a matter of fact it is a rehearing of the application.

Held, upholding the preliminary objections:

(1) It is not the law that the absence of prior notice will totally shut the door for the intended objector from raising the objection. A preliminary objection on a point of law can be raised even though no prior notice of preliminary objection is given as any preliminary objection raised may go to the root of the matter such as illegality in the proceedings taken (see pp 208D, 210C).

(2) The word 'decision' in O 49 r 6(3)(d) of the SCR could only mean the sealed judgment, that is to say, a judgment that is drawn and entered in accordance with O 29 rr 9 and 10 of the SCR (see p 210F). Order 49 r 6(3) of the SCR is mandatory in its terms by reason of the word 'shall' in the rule. It is a mandatory requirement for the record of appeal to contain the decision appealed from. An appeal under O 49 r 6(3) of the SCR is by way of rehearing before the judge in chambers; however, the judge in chambers can only hear the appeal by way of rehearing if the record of appeal has complied with the strict rules of O 49 r 6(3) of the SCR. Therefore, the record of appeal without the decision is incomplete. The record of appeal in the present case was not properly before the court and this court has no jurisdiction to hear the appeal (see p 211A–C).

A **[Bahasa Malaysia summary**

Permohonan perayu untuk memasuki penghakiman ingkar terhadap responden ditolak oleh majistret yang arif dan perayu telah merayu ke Mahkamah Tinggi. Sebelum mendengar rayuan, peguam untuk responden membangkitkan bantahan awal di atas rekod rayuan yang
B difailkan oleh perayu menurut A 49 k 6(3) Kaedah-Kaedah Mahkamah Rendah 1980 ('KMR') oleh kerana rekod rayuan perayu tersebut hanya mengandungi salinan deraf perintah majistret dan bukannya perintah bermeterai. Peguam untuk perayu menegaskan bahawa: (i) notis untuk bantahan tersebut mestilah diserahkan kepada pihak lawan dengan menyatakan alasan-alasan untuk bantahan dan
C tiada notis sedemikian diberikan; dan (ii) keperluan di bawah A 49 hanya bersifat panduan sahaja dan walaupun prosiding dipanggil sebagai rayuan, pada hakikatnya ia adalah pendengaran semula permohonan tersebut.

D **Diputuskan,** menolak rayuan tersebut:

(1) Adalah bukan undang-undang bahawa ketiadaan notis terdahulu akan terus menutup peluang kepada pihak yang berniat membantah daripada membangkitkan bantahan tersebut. Suatu bantahan awal di atas perkara undang-undang boleh dibangkitkan walaupun tiada notis bantahan awal diberikan sebelumnya oleh
E kerana sebarang bantahan awal yang dibangkitkan boleh berkenaan dengan perkara pokok seperti kepenyalahan undang-undang di dalam prosiding yang diambil (lihat ms 208D, 210C).

(2) Perkataan 'keputusan' di dalam A 49 k 6(3)(d) KMR hanya boleh bermaksud penghakiman yang bermeterai, iaitu, suatu
F penghakiman yang dibuat dan dimasuki menurut A 29 kk 9 dan 10 KMR (lihat ms 210F). Aturan 49 k 6(3) KMR adalah mandatori dari segi terma atas alasan perkataan 'mesti' di dalam kaedah. Adalah keperluan mandatori bagi rekod rayuan untuk mengandungi keputusan yang dirayu. Suatu rayuan di bawah A 49 k 6(3) KMR adalah melalui pendengaran semula di hadapan
G hakim di dalam kamar, namun, hakim di dalam kamar hanya boleh mendengar rayuan tersebut melalui cara pendengaran semula jika rekod rayuan mematuhi kaedah ketat A 49 k 6(3) KMR. Oleh itu, rekod rayuan tanpa keputusan adalah tidak lengkap. Rekod rayuan di dalam kes ini bukanlah secara wajar
H berada di hadapan mahkamah dan mahkamah ini tiada bidang kuasa untuk mendengar rayuan tersebut (lihat ms 211A–C).]

Notes

I For cases on preliminary objection, see 2(2) *Mallal's Digest* (4th Ed, 1998 Reissue) at paras 3819–3828.

For cases on record of appeal, see 2(1) *Mallal's Digest* (4th Ed, 1998 Reissue) at paras 863–890.

Cases referred to

Ho Shee Chit & Anor v Bruusgaard Kisteruds Skibsaksjeselskap & Anor [1982] 2 MLJ 35 (refd)

Interfinance Bhd v Grand Ridge Sdn Bhd & Ors [1998] 4 CLJ Supp 485 (refd)

Jasabena Sdn Bhd v Beh Heng Poo & Anor [1985] 1 MLJ 394 (refd)

Malaysia Building Society Bhd v Chee Eng Shot [1990] 1 CLJ 97 (refd)

Mat Yassin bin Dollah v Ibrahim bin Hussin & Anor [1997] 2 MLJ 681 (refd)

Nikodo (S) Pte Ltd v GVC Karaoke Sdn Bhd [1997] 2 MLJ 742 (refd)

Teoh Soon Kok t/a TSK Supplies Trading v MBf Finance Bhd [1996] 2 CLJ 130 (refd)

Tiong Hung Ming v Kalimantan Hardwood Sdn Bhd [1994] 3 MLJ 656 (refd)

United Malayan Banking Corp Bhd v Pembinaan KSY Sdn Bhd & Ors [1993] 3 MLJ 45 (refd)

United Overseas Bank Ltd v Heap Huat Rubber Co Sdn Bhd [1993] 4 CLJ 191 (refd)

Wong Sing Ha @ Wong Ha Hing (trading as Ying Nang Co) v Yii Ching King (trading as Soon Kwong Shipping Co) Sibu High Court Civil Appeal No 20–12–13 of 1996 (unreported) (refd)

Legislation referred to

Court of Appeal Rules 1994 r 18(4)
Subordinate Courts Rules 1980 O 29 rr 9, 10, O 49 r 6(3)(d)

Appeal from: Magistrate Court Case No 72–286–98–III (Magistrate Court, Sibu)

John Shek (*John Shek & Co*) for the appellant.
Wong Ho Leng (*Wong Ho Leng & Co*) for the respondent.

Cur Adv Vult

Tee Ah Sing J: In this case, the appellant's application to enter summary judgment against the respondent was dismissed by the learned magistrate and the appellant appealed to the High Court.

Before the hearing of the appeal, the learned counsel for the respondent raised a preliminary objection on the record of appeal filed by the appellant pursuant to O 49 r 6(3) of the Subordinate Courts Rules 1980 ('the SCR'). Though O 49 r 6(3) requires that the record of appeal shall contain, inter alia, a copy of the decision appealed from, the record of appeal of the appellant instead contained only a draft copy of the order of the learned magistrate which is in pp 36 to 37 of the record of appeal. The objection raised is that the said record of appeal is defective as it does not comply with the requirement of O 49 r 6(3)(d) of the SCR as it does not contain the decision of the court appealed from but only a draft order which is not the decision. In support the following cases were cited:

A (1) *Teoh Soon Kok t/a TSK Supplies Trading v MBf Finance Bhd* [1996] 2 CLJ 130.

(2) *Mat Yassin bin Dollah v Ibrahim bin Hussin & Anor* [1997] 2 MLJ 681.

(3) *Wong Sing Ha @ Wong Ha Hing (trading as Ying Nang Co) v Yii Ching King (trading as Soon Kwong Shipping Co)* — Sibu High Court Civil
B Appeal No 20–12–13 of 1996 (unreported).

The learned counsel for the appellant contended that for a counsel to raise preliminary objection a notice of such objection must be served on the other side specifying the grounds of such objection. In the present case, no such notice has ever been given and this action caught the appellant by surprise
C as the appellant would not be able to answer such objection without proper authorities. For this alone, the preliminary objection should be dismissed with costs. Secondly, in this appeal no doubt it is called appeal but as a matter of fact it is a rehearing of the application. And this is why no petition of appeal is necessary. He also stated that he did not have the authority and he needed time to look into the authority to support his argument.

D So the court adjourned the matter to 13 September 1999 for continuation of submission.

On 13 September 1999, the learned counsel for the appellant tendered a written submission. In the written submission it was contended, inter alia, as follows:

E (1) The courts in the past in dealing with the point of preliminary objection had stipulated that a party who wished to raise a preliminary objection should give prior notice at the earliest moment possible to the other party. Inexplicably, the intention is to avoid any element of surprise. In support the following were cited:

F (a) *Jasabena Sdn Bhd v Beh Heng Poo & Anor* [1985] 1 MLJ 394 at p 396.

(b) 2(2) *Mallal's Digest* (4th Ed, 1998 Reissue) at para 3823.

(c) *Interfinance Bhd v Grand Ridge Sdn Bhd & Ors* [1998] 4 CLJ Supp 485.

G The respondent had admitted that no prior notice of objection either orally or in writing had ever been given to the appellant prior to the date of hearing of this appeal. As such the respondent had waived his right to raise the preliminary objection.

(2) In the alternative, it was submitted that if this court does not agree
H with the decisions enunciated in the aforesaid authorities the requirement under O 49 is purely directory as the present case was still in the interlocutory stage and had not gone for trial. Therefore the appeal in the present case is to be done by rehearing of the instant case. In support the following cases were cited:

I (a) *Malaysia Building Society Bhd v Chee Eng Shot* [1990] 1 CLJ 97.

(b) *Tiong Hung Ming v Kalimantan Hardwood Sdn Bhd* [1994] 3 MLJ 656.

(c) *United Malayan Banking Corp Bhd v Pembinaan KSY Sdn Bhd & Ors* [1993] 3 MLJ 45. A

(d) *United Overseas Bank Ltd v Heap Huat Rubber Co Sdn Bhd* [1993] 4 CLJ 191.

(e) *Ho Shee Chit & Anor v Bruusgaard Kisteruds Skibsaksjeselskap & Anor* [1982] 2 MLJ 35. B

(f) *Nikodo (S) Pte Ltd v GVC Karaoke Sdn Bhd* [1997] 2 MLJ 742.

(3) Moreover, the appellant had his utmost best to include a draft order in the record of appeal. That was done because no sealed order could be obtained in time. The plaintiff did this in accordance with r 18(4) of the Court of Appeal Rules 1994. C

In reply, the learned counsel for the respondent submitted that there was no more element of surprise in issue when the question under O 49 r 6 of the SCR as to the inclusion of specific documents is a matter of law and the provision has been there for many years. Even if there was surprise it was confined to the hearing on 9 August 1999. It is also not the law that failure to give prior notice of preliminary objection amounts to waiver or shut the door for the intended objector. In support, the cases of *Ooi Chew Seng v Ultratech Sdn Bhd & Ors* [1997] 2 MLJ 344 and *Datuk Bandar Kuala Lumpur v Seman bin Amat & other cases* [1996] 3 CLJ 263 were cited. D

If the decision appealed from is not included, the appeal is not proper, then the court cannot hear this appeal. E

I shall now deal with the preliminary objection.

The preliminary objection was only raised during the date of hearing itself on 9 August, 1999. So there was no notice of the preliminary objection whether written or oral given to the appellant.

In *Datuk Bandar Kuala Lumpur v Seman bin Amat & other cases* [1996] 3 CLJ 263, His Lordship Abdul Kadir Sulaiman J at p 266 said: F

> Before the formal hearing of the three appeals, the learned counsel for the respondents, En Karpal Singh raised a preliminary objection on a point of law in that as the various appeals of the appellants were filed in the registry of the subordinate court the appeals are not properly brought before the High Court being in contravention of O 49 r 6 of the SCR. It is contended that the notices of appeal were not filed in the proper registry as required by the said r 6. Rather unfortunate, however, no prior notice of the intention to raise the preliminary objection was given by the respondents to the appellants except for the indication given to their learned counsel orally just before the commencement of the hearing of the appeals. G H

And at p 267 he said:

> In opposition, the learned counsel for the appellants cited *Jasabena Sdn Bhd v Beh Heng Poo & Anor* [1985] 1 MLJ 394. In that case, the sole question for decision of the court concerned the meaning and ambit of the phrase 'entered for hearing' in O 53 r 2 of the Rules of the High Court 1980 ('the RHC'). It arose on a preliminary objection taken by the respondent without any prior notice given to an application by the applicant for an order of certiorari. By way of observation his Lordship at p 396 said: I

A 'Before concluding, I have an observation to make, and it is this: Counsel for the respondents when he raised the preliminary objection herein, did so without any prior notice to his opponent. This was unfortunate and I would echo the practice advocated by Thomson, CJ in *Gurbachan Singh v Seagrott & Campbell* that when points such as this are proposed to be taken, notice in writing of an intention to do so should be given at the
B earliest possible moment to the other side who otherwise might be taken by surprise.'

However, in that case, even though no prior notice was given, the learned judge heard the preliminary objection of the respondent though for lack of merit he dismissed the objection raised.

C In *Gurbachan Singh v Seagrott & Campbell (No 2)* [1962] MLJ 370, the respondents upon the service of the notice of appeal by the appellant out of the time period prescribed, issued 'Notice of Preliminary Objection' in writing to the appellant that on the hearing of the appeal which was to take place in about 3 $^{1}/_{2}$ months from then, he would apply for the appeal to be dismissed on the grounds that they were not served with the notice of appeal within the time limited for appeal whereby the appellant was in breach of the
D then O 58 r 1A(1), O 58 r 2 and O 58 r 15 of the RSC 1957. The then Court of Appeal allowed the preliminary objection and the appeal by the appellant was struck out with costs to the respondent. At p 371 Thomson CJ has this to say:

'Before departing from the case I should observe that the procedure followed by the respondents, that is to say giving the other side notice at
E the earliest possible moment and then dealing with the matter when the appeal comes on for hearing seems to be the course that was followed and certainly not disapproved of in the case of *Re Helsby*.'

And at p 268 he said:

F In that light, I would agree with the submissions made by En Karpal Singh, the learned counsel for the respondents, that the observations made in the two cases cited are merely obiter, as the two courts were deciding on the issue raised in the two respective preliminary issues. Furthermore, the learned judge in *Jasabena*'s merely expressed that it was unfortunate that the respondent in that case had raised the objection without any prior notice. In my view, it is a good practice for a party intending to raise any preliminary objection to do so
G by giving prior notice in writing to avoid any further argument as to whether in fact any notice at all ever given and that the notice if given must be with prior notice so that the other party would not be taken by surprise. The opponent must be given the opportunity to prepare himself to answer to the objection to be raised. This objective is achieved by him being given ample notice of the nature of the objection to be raised. In this present case, though
H an eleventh hour oral notice was given, the learned counsel for the respondent is not pressing for an immediate reply to the objection to be raised. He is prepared to allow time for the learned counsel for the appellant to do so which the learned counsel, however, did not avail the opportunity given but instead gave his reply straightaway. Therefore, he cannot any more say that he was taken by surprise by the eleventh hour oral notice of the preliminary objection
I was made. It is also my view that it is not the law that the absence of prior notice will totally shut the door for the intended objector from raising the objection. The principle behind the need for the prior notice is merely to avoid surprise. But if by the conduct of the opponent it can be inferred that no

surprise to him has been caused as in this present case, the objector should be allowed to raise the intended preliminary objection even without any notice as was done in *Jasabena*'s case itself. Any preliminary objection raised may go to the root of the matter such as illegality in the proceedings taken. If it is so, the court has to accept the fact and cannot ignore the illegality as it goes to the very jurisdiction of the court in the proceedings. The court cannot condone illegality simply because no prior notice is given to raise the preliminary objection. Having heard the arguments by the two parties, I allowed the learned counsel for the respondent to raise the preliminary objection albeit only a short and oral notice was given to the appellants.

I am in agreement with his Lordship Abdul Kadir Sulaiman as aforesaid.

It is also my view that it is not the law that the absence of prior notice will totally shut the door for the intended objector from raising the objection. I am of the view that a preliminary objection on a point of law can be raised even though no prior notice of preliminary objection is given as any preliminary objection raised may go to the root of the matter such as illegality in the proceedings taken. If it is so, the court has to accept the fact and cannot ignore the illegality as it goes to the very jurisdiction of the court in the proceedings. The court cannot condone illegality simply because no prior notice is given to raise the preliminary objection.

Having heard the arguments by the two parties, I allow the learned counsel for the respondent to raise the preliminary objection albeit only a short and oral notice was given to the appellant.

Rule 18(4) of the Court of Appeal Rules 1994 has no application to our case.

In the record of appeal (at pp 36 to 37), there is an undated draft order of the learned magistrate. In the record of appeal there is no sealed copy of the judgment. I am of the view that the word 'decision' in O 49 r 6(3)(d) of the SCR could only mean the sealed judgment, that is to say, a judgment that is drawn and entered in accordance with O 29 rr 9 and 10 of the SCR (see *Teoh Soon Kok t/a TSK Supplies Trading v MBf Finance Bhd* [1996] 2 CLJ 130).

In Mat Yassin bin Dollah v Ibrahim bin Hussin & Anor [1997] 2 MLJ 681 His Lordship Nik Hashim JC at p 684 said:

> Order 49 r 3A(1) is mandatory in its terms by reason of the word 'shall' in the rule (see *Datuk Bandar Kuala Lumpur v Seman bin Amat and other cases* [1996] 3 CLJ 263). Accordingly, strict compliance with its provision is called for and failure to enclose any one of the items in the record as required by the rule, in my view, will render the appeal record defective. It has been said time and again that rules of court must be obeyed (*Ratnam v Cumarasamy & Anor* [1965] 1 MLJ 228) and must be meticulously and faithfully complied with (per Low Hop Bing JC (as he then was) in *S Ravi a/l G Suppiah v Timbalan Menteri Hal Ehwal Dalam Negeri, Malaysia & Anor* [1995] 2 CLJ 152 at p 154). Failure to comply with them will lead to chaos in the conduct of litigation (*Sykt Telekom Malaysia Bhd v Business Chinese Directory Sdn Bhd* [1994] 2 MLJ 420 at p 423, per Eusoff Chin SCJ (as he then was)).
>
> Thus, without the decision and following *Teoh Soon Kok*'s case, I hold that the appeal record in the present case was not properly before the court.

A The record suffered from a serious defect for not being in compliance with the strict rules of O 49 r 3A(1)(d) of the SCR.

I am of the view that O 49 r 6(3) of the SCR is mandatory in its terms by reason of the word 'shall' in the rule. So it is a mandatory requirement for the record of appeal to contain the decision appealed from.

B It is trite law that an appeal under O 49 r 6(3) of the SCR is by way of rehearing before the judge in chambers. However, the judge in chambers can only hear the appeal by way of rehearing if the record of appeal has complied with the strict rules of O 49 r 6(3) of the SCR.

In the result, the record of appeal without the decision is incomplete. I hold that the record of appeal in the present case was not properly before C the court and this court has no jurisdiction to hear this appeal.

For the reasons stated, I uphold the preliminary objection and I dismiss the appeal with costs to be taxed unless agreed.

Appeal dismissed.

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Reported by Benjamin Yong

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